Supreme Court, U.S.
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No. 04-1327

In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA ,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of South Carolina

Respondent's Brief In Opposition

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Capital Case

PETITIONER'S QUESTIONS PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence - and especially its forensic evidence - to be "strong", third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

2. Whether a capital defendant is denied due process when a prosecutor successfully moves for the exclusion of third-party guilt evidence and then, in closing argument, urges the jury to find the defendant guilty because of the absence of such evidence?

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Admissibility Of Evidence Offered By A Criminal Defendant To Suggest That Someone Else Is Guilty, 63 Tenn. L.Rev. 917, 919-938 (1996) 7

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1a-18a) is reported at 605 S.E.2d 19. The order of the South Carolina Court of General Sessions (Pet. App. 19a-24a) is unreported.

JURISDICTION

The South Carolina Supreme Court's judgment was entered on November 1, 2004. A timely petition for rehearing was denied on December 1, 2004 (Pet. App. 25a). The jurisdiction of this Court is allegedly invoked under 28 U.S.C. § 1257(a). For reasons set forth below, Respondents submit that this Court lacks jurisdiction in portions of Question I and the all of Question II.

RESPONDENT'S STATEMENT OF THE CASE

1. The Trial and Prior Proceedings.

The Petitioner, Bobby Lee Holmes, is currently a safekeeper in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for York County. Holmes was indicted at the February 26, 1990 and March 9, 1990 terms of the Court of General Sessions for York County for the crimes of murder, burglary in the first degree, criminal sexual conduct in the first degree, and robbery involving the December 31, 1989 beating of Ms. Mary Stewart resulting in her death on or about March 10, 1990. (90-GS-46-1196-1198). The matter was initially called for trial on April 13, 1993 The jury found the Petitioner guilty of all charges on April 17, 1993. On April 19, 1993, the jury returned a verdict finding the statutory aggravating circumstances and recommended the death sentence. Holmes was sentenced to death. The Supreme Court of South Carolina affirmed the convictions and death sentence. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995). Certiorari was denied by the United States Supreme Court. Holmes v. State of South Carolina,, 517 U.S. 1248 (U.S. S.Ct. June 10, 1996).

State postconviction relief was subsequently granted directing a new trial be held. *Holmes v. Moore, 96-CP-46-966, Order (January 15, 1998)*. In that proceeding, Holmes was represented by John H. Blume, current counsel of record before this court for Amicus Curiae "Certain Professors of Evidence Law."

The matter was called for a new trial on March 12, 2001. The jury found Holmes guilty of robbery, burglary in the first degree, criminal sexual conduct in the first degree and murder. ROA 4350.

On March 28, 2001, the jury found the existence of three aggravating circumstances: murder was committed while in the commission of criminal sexual conduct, murder was committed while in the commission of during the commission of burglary, and murder was committed while in the commission of physical torture. ROA 5737-38. The jury recommended the death sentence. ROA 5738. Holmes was sentenced to 15 years concurrent on robbery, thirty years concurrent on criminal sexual conduct in the first degree, life imprisonment concurrent for burglary in the first degree and death penalty for murder. ROA 5749-5750.

2. The Instant Appeal

The Petitioner made an appeal to the South Carolina Supreme Court from the second conviction. In this appeal, pertinent to this appeal, he raised issues as to whether the circuit court had erred in refusing to admit proffered evidence that the crimes were committed by Jimmy McCaw White. See *Final Brief of Appellant*. p. v. Statement of Issues on Appeal, II-VIII. The South Carolina Supreme Court affirmed the conviction and death sentence on November 1, 2004. State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004). On the issue of the admission o the evidence in the guilt phase, the Court concluded that pursuant to the standards state evidentiary law on the admission of evidence of third party guilt set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) and State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) that evidence of third party's guilt did not raise reasonable inference as to defendant's innocence and thus was not admissible. On the issue

concerning the prosecutor's guilt phase closing argument comments, the South Carolina Supreme Court summarily held that the failure to contemporaneously object at the time of the comments precluded appellate consideration.

3. Statement of the State's Factual Case

The South Carolina Supreme Court summarized the facts of the crime. These are set out in the appendix to the petition at 2a-7a. This portion of the opinion is incorporated herein by reference.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. Since The Federal Constitutional Claims Raised In The Petition Were Never Presented To The South Carolina Supreme Court On the Admissibility of Third Party Culpability Evidence in the Guilt Phase of the Trial and the Petitioner Asserted In That Court That The *Gregory-Gay* Test Was Appropriate, Certiorari Is Not Authorized Under 28 U.S.C. Section 1257.

Holmes initially contends that certiorari is warranted because the treatment of rejecting the proffered third party guilt evidence involving Jimmy White *in the guilt phase* as a matter of state evidentiary law conflicts with the Court's jurisprudence to allow a defendant to present a complete defense, citing Crane v. Kentucky, 476 U.S. 683 (1986) and Chambers v. Mississippi, 410 U.S. 14, 19 (1973). For the various reasons set forth below, we submit that certiorari is not warranted.

A. *The Constitutional Issues Raised In The Petition Are Not Preserved For This Court's Jurisdiction.*

The Petitioner asserts, for the first time, that the state court evidentiary standard of State v. Gregory, 198 S.C. 98, 165 S.E.2d 532 (1941) violates this Court's mandates in Chambers v. Mississippi, 410 U.S. 284 (1973) because it allegedly creates a *per se* exclusion of 3rd party guilt evidence where the prosecution case is

"strong." This constitutional challenge to the existing state evidentiary test was never raised in *any* challenge to the guilt phase evidence before the Supreme Court of South Carolina. In fact, Chambers and its progeny were never cited in the Final Brief of Appellant on the guilt phase issues where they relied solely on reference to state evidentiary law and rules to support the admission. See *Final Brief of Appellant*, pp. 7-30, *Final Reply Brief of Appellant*, pp. 5-19.[1] In fact, the Appellant claimed that State v. Gregory was the appropriate test for the court to consider the admission of this evidence. *Final Brief of Appellant, pp. 9, 18, 30. Final Reply Brief of Appellant*, p. 10. Also, the Appellant cited the decision of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) in support of their position on admissibility. *Final Brief of Appellant*, pp. 17, 19; *Final Reply Brief of Appellant*, pp. 9. Conclusively, in the petition for rehearing before the Supreme Court, the petitioner again stated that the evidence was admissible under "the Gregory and Gay standard." *Petition for Rehearing*, p. 2. **No particular reference was made to any federal constitutional violation concerning the *Gregory-Gay* standard in the guilt phase arguments in the appeal.**

Since the Petitioner contended that the *Gregory - Gay* analysis was the appropriate guilt phase evidentiary standard in the state court, he has not preserved his right to assert these matters de novo before this Court.[2] These belated assertions by Petitioner before this Court present new constitutional claims which were not

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[1] The only guilt phase argument to any non-South Carolina evidentiary cases was a passing reference to Chambers in a footnote in the *Reply Brief of Appellant, p. 10, n. 11.* In that setting, it was being cited which support for the corroboration requirement of SCACR Rule 804(b)(3), not as a challenge to state standard.

[2] Remarkably, the Petitioner and the amicus curiae chastise the Supreme Court of South Carolina for not citing Chambers in their guilt phase evidence analysis. A review of the petitioner's presentation on the guilt phase issues to the South Carolina Supreme Court similarly reveals that his entire argument was based upon a state law evidentiary analysis without reference to the constitutional issues he now presents.

presented below. As revealed in the *Final Brief of Appellant*, the guilt phase evidentiary issues raised were solely based upon state evidentiary law and its applicability to the various offers of third party guilt evidence suggested by Holmes. Now, for the first time, he attempts to suggests that Chambers mandates and further deprivations of his right to a jury trial and guilt beyond a reasonable doubt is implicated by the failure to admit the evidence. He never challenged the state standards for the admission of evidence of third party guilt as he does before this Court. At that time, he was asserting that he satisfied those standards, not that the standards themselves violated the federal constitution. Since his assertions raise new completely claims, never sought to be addressed in the South Carolina Supreme Court, they must be barred from certiorari consideration.

A mere conclusory reference in the Final Brief of Appellant to the Constitution is insufficient to preserve jurisdiction for certiorari in this Court. See, *Final Brief of Appellant*, pp. 19, 22, 26, 30, 36 . Herndon v. Georgia, 285 U.S. 441, 442-43 (1935); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) ("due process of law" insufficient). In Howell v. Mississippi, --- U.S. ----, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) (per curiam), the Court concluded that petitioner's federal constitutional claim was not properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257 because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." Id. at 858. 28 U.S.C. Section 1257 requires that federal law challenges to state law decisions be "addressed by or properly presented" to the state court before the Supreme Court may hear the case. Id. at 860. See, e.g., Adams v. Robertson, 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); New York Central R. Co. v. New York, 186 U.S. 269, 273, 22 S.Ct. 916,

46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference"). The similar failure to meet these minimum standards by Holmes in the South Carolina Supreme Court bars consideration of his question presented here. [3]

II. The Court should not grant certiorari to fashion general evidentiary rules on the admission of third party culpability evidence under the guise of the federal constitution.

The Petitioner and the amicus curiae make a request for this Court to make uniform evidentiary standards for the admission of third party guilt evidence. They recognize that

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[3] The Respondents acknowledge that Holmes did make reference to Chambers in his presentation on the failure to admit the evidence in the penalty phase. *Final Brief of Respondents, pp. 38-43.* However, a review of the petition before this Court reveals the current issue is solely on the guilt phase evidence issue, not the penalty phase.

Further, Respondents submit that this court must ignore the belated attempt of the *amicus curiae* to reconstruct the issue to also argue the exclusion of the evidence in the penalty phase violates the Eighth Amendment. See *Brief of Amicus Curiae Certain Professors of Evidence, p. 2, n. 1.* Contrary to the assertions of the amicus, there is no argument or citation to the Eighth Amendment in the present petition for writ of certiorari before this Court. Furthermore, in representing the opinion of the Supreme Court in his Petition, Holmes makes no reference to the portion of the opinion which addressed the penalty phase issue or the conclusions of the South Carolina Supreme Court on that claim. See, *Petition, p. 14-15,* citing *Pet. App. at 11a-12a.*

courts apply varying standards to admission of this evidence. Some courts use the Federal Rule of Evidence Rule 401 or the state equivalent and the principal of relevancy to determine admissibility. Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990)(upholding the exclusion of evidence that others committed the charged crime on relevancy grounds). Other use a "connection" test. See, e.g., People v. Arline, 13 Cal. App. 3d 200, 203 (Cal. Ct. App. 1970)(stating that there were no facts to "connect [the third party] with the crime"); State v. Giguere, 439 A.2d 1040, 1043 (Conn. 1981)("We have stated: 'Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.'"). See also State v. Koedatich, 548 A.2d 939, 978- 79 (N.J. 1988)(collecting state and federal cases admitting and excluding evidence based on the existence or nonexistence of a "link" or "connection" between the "third party and the victim or the crime"). Some use Rule 403 (the prejudice rule) to exclude such evidence, People v. Hall, 718 P.2d 99, 104 (Cal. 1986), while others use the balancing test in conjunction with a "critical and reliable conclusion. Others have adopted a "reasonable doubt test, People v. Conlogue, 474 A.2d 167, 172 (Me. 1984)(evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability"); People v. Hall, 718 P.2d 99, 104 (Cal. 1986)("[T]hird party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt."). while others apply a combination of all three. State v. Caulk, 718 P.2d 99 (Cal.1986). See generally David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility Of Evidence Offered By A Criminal Defendant To Suggest That Someone Else Is Guilty*, 63 Tenn. L.Rev. 917, 919-938 (1996); Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else*

Committed the Crime Charged: Is It Constitutional?, 76 Neb. L. Rev. 272, 293-94 (1997) . They contend that this variety of tests breed confusion in the admission of the evidence, particularly when the state courts regularly do not cite any federal authority for their standards.

The argument, pared down, seems to be a request that the Court fashion general evidentiary rules, under the guise of interpreting the Due Process Clause, which would govern the admissibility of evidence at state criminal trials. The Supreme Court has not done so in the past, however, and should not do so today. The Federal Constitution does not establish a federal code of evidence to supersede state evidentiary rules in state court trials. Romano v. Oklahoma , 512 U.S. 1, 12 (1994) Cf. Payne v. Tennessee, 501 U.S. 808, 824-825 (1991); Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990).

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and ... we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' ... and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Patterson v. New York, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977) (("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, 74 L.Ed.2d 646 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). "It has never been thought that [decisions under the Due Process Clause] establish

this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Spencer v. Texas, 385 U.S. 554, at 564 (1967).

Certiorari is not warranted to establish a uniform federal standards for the admission of third party guilt evidence in state court.

III. The South Carolina Supreme Court's Application Of Its State Evidentiary Standard In Denying the Admission of Third Party Guilt Evidence Concerning Jimmy McCaw White Was Appropriate Where The Evidence Did Not Rise To The Level of Trustworthiness Necessary To Establish Its Admissibility Where the Proffered Evidence Did Not Raise A Reasonable Inference or Presumption As To His Own Innocence.

In denying relief on this issue, the South Carolina Supreme Court stated:

> Appellant fails to meet the standard set out in *Gregory*[4] and *Gay*[5] due to the strong evidence of his

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[4] In the opinion, the South Carolina Supreme Court stated the following standard arises from its earlier holding in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560):

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . .
>
> . . .But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts,

guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.. . .

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police

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disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

[5] The Holmes Court also cited the holding in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

officers and was in the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen, i.e. a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

State v. Holmes, supra. Respondents submit that this analysis did not "infringe upon a weighty interest of the accused."[6] Certiorari is not warranted.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta,

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[6]The trial judge held that he was going to disallow the testimony holding that it could not come in under SCRE Rule 803 (b)(3) and Rule 801(d)(1)(a). ROA 3655. Relying upon Gregory, the court held that the statement lacked trustworthiness because there was no evidence that tends to clearly point out that Mr. White was guilty of the crime. ROA 3655-56.In his earlier written order on August 23, 2000, the court noted that although he had presented some testimony that White was in the proximity of Mary Stewart's apartment at a time when the victim was beaten, the engine that "drives the train" under the Gregory standard of the White admissions fell short of the indicia of trustworthiness lacking any details and no forensic evidence links White to the crime. Supp. ROA p. 3-5.

467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. See Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 653- 654, 98 L.Ed.2d 798 (1988); Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987); Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973). A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " Rock, supra, at 55, 107 S.Ct., at 2711 (quoting Chambers, supra, at 295, 93 S.Ct., at 1046); accord, Michigan v. Lucas, 500 U.S. 145, 149, 111 S.Ct. 1743, 1746, 114 L.Ed.2d 205 (1991). However, that right is not unlimited. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)) (emphasis added). "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302, 93 S.Ct. 1038. The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." Scheffer, 523 U.S. at 308, 118 S.Ct. 1261. See Rock, supra, at 58, 107 S.Ct., at 2712-2713; Chambers, supra, at 302, 93 S.Ct., at 1049; Washington v. Texas, 388 U.S. 14, 22-23, 87 S.Ct. 1920, 1924-1925, 18 L.Ed.2d 1019 (1967).

In Scheffer, the Court revisited the issue of balancing the defendant's right to present a defense against the state's right to prevent unreliable evidence. Scheffer held that a *per se* ban on polygraph evidence did not constrain unconstitutionally a defendant's right to present exculpatory evidence. 523 U.S. at 317, 118 S.Ct. 1261. Scheffer distinguished Washington and Rock. The Court noted that the exclusions of evidence in those cases "significantly undermined fundamental elements of the defendant's

defense." Id. at 315, 118 S.Ct. 1261. Specifically, Scheffer held that barring the admission of an allegedly exculpatory polygraph test did not do so, id. at 309, 118 S.Ct. 1261, and it contrasted the polygraph limitation with the preclusions on the testimony of a percipient witness and the testimony of the defendant, respectively, in Washington and Rock, id. at 315-16, 118 S.Ct. 1261. The distinction between Washington, Rock, and this case, on the one hand, and Scheffer, on the other, is this: In the former, a trial court prohibited presentation of the substantive content of a defendant's testimony or a percipient witness' testimony, id. at 315, 118 S.Ct. 1261, while in the latter a trial court prohibited something much less direct, and much more within the jury's province--third-party evidence of the truthfulness of the substantive content of the defendant's testimony, id. at 315-16, 118 S.Ct. 1261.

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court was confronted with a defendant's inability to introduce evidence that a third person had repeatedly confessed orally to committing the murder with which the defendant was charged. When Chambers was tried, the Mississippi Rules of Evidence did not recognize an exception to the hearsay rule for declarations against penal interest and adhered to the common law "voucher rule." The Supreme Court held that the exclusion of the evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment. In Chambers, the Court explicitly noted that the third party's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability." *Id.* at 300, 93 S.Ct. 1038. The third party confessed to three different individuals. The confessions were made spontaneously and to close acquaintances shortly after the murder occurred. The confessions were corroborated by substantial independent evidence. The declarant did not stand to benefit from disclosing his role in the murder, and the declarant was present in the courtroom and could have been cross-examined under oath. *Id.* at 300-01..

The Court briefly noted that a rationale for the rule against hearsay is to exclude untrustworthy testimony. *Id.* at 298, 93 S.Ct. 1038. Where the testimony bears persuasive assurances of

trustworthiness and the testimony is exculpatory in nature, the hearsay rule should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 93 S.Ct. 1038. Accordingly, Chambers effectively held that stringent application of the rule against hearsay may violate fundamental standards of due process when the rule is applied mechanistically and in a manner precluding introduction of statements against penal interest that are both reliable and "directly affecting the ascertainment of guilt." *Id.*

The crux of Chambers is that a defendant has a fundamental right to present *reliable* evidence of a third party's confession to a crime for which the defendant is being tried. Evidence of a spontaneous confession by a third party that is corroborated by direct evidence satisfies a showing of "particularized guarantees of trustworthiness" and is sufficiently reliable to be admissible as an exception to the rule against hearsay.

The Petitioner maintains that he was denied the opportunity to present a defense pursuant to Chambers because hearsay evidence relating to an element of the State's case was excluded. The Petitioner, however, fails to recognize the limited application of Chambers articulated in subsequent Supreme Court decisions.

In Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), a plurality of the Court noted the limited application of Chambers by stating:

> the holding of Chambers-if one can be discerned from such a fact-intensive case-is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to a level of a due process violation.

Id. at 53, 116 S.Ct. 2013. The limitation on Chambers was subsequently confirmed by an eight-Justice majority, excluding Justice Stevens, in United States v. Scheffer, 523 U.S. 303, 118 S.Ct.

1261, 140 L.Ed.2d 413 (1998). In Scheffer, eight Justices agreed that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." 118 S.Ct. at 1268.

Because it is clear that the application of Chambers should be limited to the facts of that case when applied to issues involving hearsay evidence, this Court would have to examine the facts of these cases. Chambers involved the impact of Mississippi's voucher rule. Such a *per se* exclusionary standard is not involved in this case where the reliability and corroboration of testimony was the touchtone of the state court analysis Gregory analysis. In Chambers , the Court went through numerous factors that supported persuasive assurance of trustworthiness concerning the hearsay statements. Similarly, where the South Carolina Supreme Court and trial court analyzed the case and resolved it against the strong evidence of guilt which the inadmissible evidence did not confront, the testimony was unreliable. This reasoned analysis is consistent with Chambers. The standard in South Carolina does not create a per se exception to third party guilt evidence, only an exception to unreliable evidence suggesting third party guilt. The failure to admit was not constitutional error.

A review of the case below reveals that the Petitioner's federal constitutional rights were not violated by the exclusion of the unreliable evidence.

ADMISSIBILITY OF EVIDENCE OF THIRD PARTY GUILT IN SOUTH CAROLINA

Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt .State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988). The South Carolina Supreme Court has imposed strict limits on the admissibility of third party guilt. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Before a statement against interest (offered to exculpate the accused) can be received into evidence, there must be such proof of

connection with it, such a train of facts or circumstances, as tends clearly to point out such person as the guilty party. State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). "The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." "But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances as tends ***clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.*** An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is probably more guilty." Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35 [emphasis added]; accord State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988); State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705, 706 (2000).

The Supreme Court of South Carolina has held that evidence of a third party's motive and opportunity to kill the victim is properly excluded where the appellant nonetheless fails to show that the proffered evidence is inconsistent with his guilt. State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). In Gay, the State Supreme Court further found that given the strong evidence of guilt of the defendant - especially the forensic evidence - and the fact that the experts found that the samples, like here, did not match the alleged third party, the proffered evidence did not raise a "reasonable inference" as to the appellant's own innocence, citing Gregory , and simply was not inconsistent with the defendant's guilt.

Evidence of third party guilt may also be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See SCRE Rule 403.

In State v. Gregory, supra, the South Carolina Supreme Court sustained the exclusion of certain evidence of third party guilt, saying it did not sufficiently link a third person with commission of the crime involved, and because the collateral matter tended to confuse the jury. See SCRE Rule 403 (which cites Gregory in the annotations). See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992) (out-of-court statements against penal interest made by an unavailable declarant are admissible at trial, however, if offered to exculpate the accused in a criminal trial, they are admissible only if corroborating evidence clearly indicates the trustworthiness of the statements). State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). Rule 804(b)(3), SCRE, codified this exception to the hearsay rule. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).(A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement).

THE PROFFERED THIRD PARTY GUILT EVIDENCE MERELY CONSISTS OF "REMOTE ACTS, DISCONNECTED AND OUTSIDE THE CRIME ITSELF"

The Petitioner asserts that the trial court should have allowed certain evidence that Jimmy White (Jimmy McCaw White), and not Bobby Lee Holmes, raped and murdered Mary Stewart. As reviewed by the South Carolina Supreme Court, the proffered evidence does not withstand close analysis where the forensic evidence of his guilt does not raise a reasonable inference of his own innocence to allow the admission of this evidence.[7]

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[7] It should be noted that there is extensive forensic evidence linking Holmes to the crime scene and the victim. His palmprint was found at the victim's home on the interior of the door at the victim's apartment. ROA 2870, 2876-2883. Also fibers consistent with the victims' nightgown was found on the defendant's blue jeans and fibers consistent with the

Holmes has assembled a collection of small, conjectural inferences which attempt to bootstrap each other so as to create an appearance of voluminous evidence of the third party's guilt, thereby giving credence to a series obviously untrustworthy statements against interest purportedly made by Jimmy White.

As lengthy as the list may be, it does not come close to meeting the requirements for introduction of evidence of third party guilt. Individually or collectively, the items on Holmes' list which he asserts point to Jimmy White as Mary Stewart's killer do not offer facts inconsistent with Holmes' guilt and do not clearly point to the guilty of Jimmy White.

The State submits that the "train of facts" proffered by the defense purportedly to clearly point out Jimmy White as the guilty party constitute little more than "remote acts, disconnected and outside the crime itself."

Gilmore, Jamison, Brown and Boyd

Taking their testimony in the light most favorable to the defense, three of these witnesses put Jimmy White in the California Street/Pecan Circle area between 3:30 am and 5:30 am on the morning of December 31, 1989. Meshelly Gilmore, contrary to the defense's assertion of 6:30 am, testified that she saw Jimmy White between 3:30 am and 4:30 am in the Pecan Circle parking lot away from Mrs. Stewart's home. ROA p. 5925-5929. Frenetta Jamison saw him on the hill on California Street between 4:30 am and 5:30 am after returning from approximately 7½ hours of drinking at

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victim's bed clothing was found on his hooded jacket. ROA 2997. PCR DNA testing also showed that the Petitioner's underpants contained a mixture of DNA consistent with both the Petitioner's DNA and consistent with the victim's DNA . ROA 3527. Also, the Petitioner's shirt and a paper towel from the crime scene contained mixtures that the defendant and the victim could not be excluded from. ROA 3301-02, ROA 3526-30. It was also reported that the further testing of the material from the crime scene, the victim or the Petitioner excluded Jimmy White's DNA as a contributor. ROA 3306-07.

Clyde's. ROA 5910. Deloris Brown looks briefly out of her apartment window onto California Street between 4:00 am and 5:00 am and sees an individual she identifies as Jimmy White solely by the way he walked. ROA 6163. Annie Boyd says she does not know what time it was or who knocked and said "open the door Mama Ann, it's me Jimmy." None of the witnesses were able to identify the clothing of the individual. ROA 5984-88, 5990-91. Although this testimony is certainly suspect for the variety of reasons previously enumerated, even if completely credible as the court in its Order recognized, it does little more than place Jimmy White in the area prior to the crime. Such evidence is not inconsistent with Holmes' guilt in that none of this testimony precludes Holmes from actually being in Mrs. Stewart's home committing the assault while Jimmy White was merely in the neighborhood. Therefore, such evidence falls far short of raising a reasonable inference or presumption of Holmes' own innocence and would fall more closely into the area of conjecture of fanciful analogy.

Joshua Lytle

Based on Mr. Lytle's testimony, the defense attempts to prove that Jimmy White lied regarding his whereabouts at the time of the crime. However, Mr. Lytle believed that his April 7, 1990 statement was taken on December 31, 1989, the morning of the incident. ROA p. 5949-50. His own recollection of the events of the night was inconsistent with his statement. ROA 5950-61.

Nonetheless, taking the defense's view that Jimmy White lied about his alibi still has no other effect than to cast a bare suspicion on Jimmy White and even that is extremely tenuous. Again, as the trial court recognized this testimony does little more than support the proximity argument. Supp ROA 2-5.

Mrs. Stewart's Description of the Assailant

The defense has consistently maintained that Jimmy White fits the description better than Holmes based on hair length and age. However, it is equally clear that Holmes better fits the description when the criteria are skin tone, build and clothing description. Mrs.

Stewart described the assailant as "big and dark", "chunky""hair longer than most black people" wearing a dark "black or blue" jacket, "black" " a male in his late 20's. Such evidence provides no connection for the defense's "train of facts." ROA 2150, 2167-68, 2182-83, 2219-20, 2235.

Jimmy White's Alleged Confessions

When the defense's "train of facts" is distilled to its "bare," "remote", "conjectural", "fanciful" essence all that is left is a series of highly questionable quasi-confessions attributed to Jimmy White by a number of suspect witnesses. Under Rule 804, SCRE, Holmes cannot call these witnesses to testify concerning White's statements since White is available to testify. (See, also Cooper at 588). However, Holmes' reliance on Rule 613, SCRE is equally misplaced. Calling Jimmy White as a defense witness for the sole purpose of impeaching him through extrinsic proof of his prior statements is not appropriate under the holding in Cooper. Jimmy White has no relevance to this case other than as a backdoor means of interjecting third-party guilt. Therefore, any such testimony would be improper as substantive evidence of third party guilt and the Court properly excluded such evidence.

Holmes says Jimmy White "confessed" on a number of occasions to various people. An examination of these for the necessary clear indications of trustworthiness that the statements were actually said, and of the truth of the content (that Jimmy White killed Mary Stewart, not Bobby Holmes), would show a serious lack of credibility that they were actually spoken.

The witnesses Holmes has produced in support of the alleged "confessions" by Jimmy White exhibited a variety of characteristics which render their credibility extremely suspect. These included: 1.)denying statements made previously in sworn affidavits; 2) statements in sworn affidavits of events and meetings which were physically impossible; 3) deviations from earlier statements; 4)inherent biases, such as familial or close personal relationship with the defendant; 5)intoxication by the witness at the pertinent time; and 6) witnesses from the very small community of

York coming forward now, years after the crime and an earlier highly publicized trial, in such a way as to make their reliability extremely suspect. Under South Carolina Rules of Evidence 403 and 804(b)(3), as well as the South Carolina Supreme Court's holdings in Kinloch, Forney, and Gregory, this evidence of third party guilt was inadmissible.

On Stephan Westbrook, it was developed that the statements he gave contained numerous inaccuracies and was not true in parts and he even asserted at one point that he just signed the statement and had not read it. ROA p. 6024-25, 6032 - 34, 6059-62, 6067-68. It was developed that although he stated he knew Holmes "from around" that his family connections were so close that Holmes had put Westbrook's brother on his visitor list. ROA 6024-25, 6067-68. He acknowledged that in his statement and testimony he referred to different times. ROA 6079, 6084-91. Some of the circumstances he described were physically impossible since White was not in custody at the stated time. ROA 6081-82.

Thomas Murray clarified that he never heard White admit to the crime that Holmes was accused of. ROA p. 6397, 6399. He denied ever stating what was in the affidavit that knowledge of White committing the crime was widespread and puts him in trouble with other inmates. ROA. 6399. Murray denied other portions of his affidavit. He denied ever stating item 4 in the affidavit concerning about White framing Holmes for a dispute in York, because he did not know anything about it. ROA p. 6400-01. He also stated that he had spoken with Pope's office that and told them that no woman had ever notarized his signature on a statement. ROA p. 6408-09. Murray stated that White was just saying that he knew Bobby was innocent, but he never said he did it. Id. ROA 6409.

Mattie Scott stated that White comes to her house intoxicated and everyone starts talking about raping and killing, while they were "drinking and talking" among a group. ROA p. 6420.

Ken Rhodes admitted being good friends with Bobby Holmes since the mid eighties. ROA p. 6429, 6444. he stated that he

used to ride with Holmes. ROA p. 6445. He stated that he had also met his mother and father. ROA 6445-46. He had also known White his entire life. He stated that during the time with White alleged comments Rhodes described his incarceration history since 1993. ROA p. 6447-49. He stated the only person he had told was his wife. ROA p. 6449. However, at some point he received a call from Holmes lawyers. Id. However, there was never any testimony that involved this particular crime, only that White ran with older women. ROA 6454.

As stated previously, White denied ever admitting guilt to Westbrook, Murray, or Bennett. ROA p. 6129-30.

The statements against penal interest by the third party, Jimmy White, which Holmes is attempting to offer, lack the clear indications of trustworthiness that they were actually spoken as alleged. A determination of whether the trustworthiness of a declaration against penal interest offered to exculpate the accused is "clearly indicated" by corroborating circumstances includes not only the trustworthiness that the declaration was actually spoken, but also whether the trustworthiness of the content is clearly indicated. See State v. Kinloch, supra ("As neither the making of the statement nor its truth were clearly corroborated, we find no abuse of discretion in exclusion of Robinson's testimony."); State v. Forney, supra; State v. Doctor, supra. Compare, State v. McDonald, 343 S.E.2d 319 , 540 S.E.2d 464 (2000) ("...the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statement's contents, but rather to the making of the statement. In many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration...As a practical matter the two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances.") See; United States v. Salvador, 820 F.2d 558, 561 (2d Cir. 1987) (corroborating circumstances must be strong, nor merely allowable); United States v. Mackey, 117 F.3d 24, 28-29 (1st Cir. 1997) (corroborating circumstances requirement not unrealistically severe, but goes "beyond minimal corroboration," and trial court has substantial discretion in finding on trustworthiness).

The South Carolina Supreme Court in State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999), upheld the denial of evidence of third party guilt. In Beckham, a murder case, the victim was killed on a roadway. The defendant attempted to introduce evidence that two men were on the roadway at the time of the murder. The Court said the evidence of the two men would not exculpate the defendant, and the exclusion of the evidence was not error. Beckham at 317.

Here, the trial court correctly found that the alleged statements of White, particularly the comments by Westbrook lacked the indicia of trustworthiness necessary to allow its admission as third party guilt as reliable evidence. As in Gay, there is strong evidence of guilt of the defendant - especially the forensic evidence - and the fact that the experts found that the samples, like here, did not match the alleged third party, the proffered evidence did not raise a "reasonable inference" as to the Petitioner's own innocence, Gregory , and simply was not inconsistent with the defendant's guilt.

None of the proffered testimony contains evidence, absent the alleged comment to Westbrook itself, which would link Jimmy McCaw White to the crime other than information that from all the testimony appears to have been common knowledge, i.e. an "old woman" had been beaten and raped in the early morning hours and that Holmes had been tried, convicted and sentenced to death for the crime. None of Jimmy McCaw White's statement contain details of the crime and no forensic evidence has been offered linking Jimmy McCaw White to the crime. White's alleged statements are general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions."

None of the alleged White statements given were presented in a manner to suggest any reliability or corroboration that they even occurred. The trial court did not abuse its discretion in disallowing the comment to be introduced. Here, because White's alleged statements bore no indicia of reliability. In Chambers, the declarant's statement was corroborated both by the circumstances of its making and by other evidence. 410 U.S. at 300, 93 S.Ct. 1038, 35 L.Ed.2d

297; see, also, Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738. In this case, Jimmy White's alleged comment were not corroborated at all by other evidence. The trial court did not err in excluding this information from the penalty phase of Holmes capital trial. The South Carolina Supreme Court's acknowledgment that Holmes failed to satisfy the *Gay-Gregory* standard due to the strong evidence of guilt is plainly supported by the record.

Contrary to conclusory statements, the Petitioner ignores the fact that the Gregory standard of admissibility test is not merely to the strength of the state's case, but to the showing of a "reasonable inference or presumption of his own innocence." In this setting, the forensic evidence uniquely tied Holmes to the case, including the six (6) factors specifically addressed in the opinion.

Holmes further contends that this somehow relieved the state of its burden of proof beyond a reasonable doubt, citing In Re Winship, 397 U.S. 358 (1970). Nothing in the standard for the admission of third party guilt evidence relieves the state of its burden of proof. To the contrary, it remains entirely on the state to show guilt beyond a reasonable doubt. The mere fact that incompetent evidence is not admitted by the defense does not undermine this burden. The fact that there is a burden of production placed upon the defendant for the admission of certain evidence does not create the risks Petitioner now associates with this standard. Further, equating this evidentiary standard with the deprivation of a jury trial of the facts under Apprendi v. U.S., 530 U.S. 466 (2000), is a remarkably stretch of the constitutional fabric. Nothing removes any factual proof the state must show to convict Holmes. His rhetorical suggestion otherwise must be rejected.

Certiorari must be denied for the various reasons set forth above.

IV. Where the Petitioner Failed to timely object to the prosecutor's comments is not preserved for certiorari review by this Court.

In his second argument, he asserts that the trial court erred in denying a *belated* motion for a mistrial when the prosecutor in his guilt phase closing argument commented , "if [Petitioner] didn't commit the crimes, that's one explanation...[who did it.", ROA 4215, ll. 8-9 and "if you are going to frame them and its going to be Bobby Holmes, where is this raping, murdering , beating fellow that actually did this thing?" ROA 4220, 4264. In summarily denying relief, the Supreme Court of South Carolina concluded that: "Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR . . . *Issue VI:* State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied,* 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review)." State v. Holmes, supra., 361 S.C. 344, 605 S.E.2d 24-25. In denying this issue on a well settled failure to timely object during the argument, the procedural bar established in the state court similarly precludes consideration in this Court.

How The Issue Was Untimely Raised In The State Court

Contrary to the assertions in the Petitioner's brief, there were no contemporaneous objections to the comments of the prosecutor as required under state law to preserve the issue for appellate review. It was only after the argument was completed that the defense made its objection to the particular comments for the first time that he had posed a question to the jury about third party guilt.

The prosecution requested the court to take the whole section in context. ROA p. 4240,ll 17-25. He asserted that it was a comment on the police work and whether they were attempting to frame Holmes, not on the Jimmy White issue, when taken in context. See also, ROA p. 4252, 4258-59.

The trial court noted that there was no contemporaneous objection to this statement for another challenge comment. ROA p. 4243, ll. 4-11. Counsel asserted he had failed to object, but it would not have made any difference concerning a potential curative instruction. ROA p. 4243.

The trial court held that the objection was not timely made and was not properly before the court. ROA p. 4264, ll. 8-13. The court further determined that the comment was made "in context of the officer's investigative work and matters dealing with looking at the investigative work and the case worked up the state." ROA p. 4264. He denied the motion for a mistrial. On appeal, applying state procedural law which was well established, the South Carolina Supreme Court similarly held this issue barred from consideration.

1. The failure to timely object to the challenged comment properly precluded appellate review and further precludes certiorari consideration.

The trial court found that it could not consider the matter due to a failure of the defense to contemporaneously object to the comment. The failure to timely object to comments made during the argument precludes appellate review of the issue. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Franklin, 318 S.C. 47 (1995). The state trial court and appellate court correctly found this matter could not be considered due to the failure to timely object during the arguments as a matter of state procedure.

It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review in South Carolina . State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (to preserve error for appellate review, defendant must make contemporaneous objection on specific ground); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct.App.1995). The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986); State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976).

In State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961), the court held that a defendant's objection made for the first time after the argument was completed and in a motion for a new trial was too

late. In State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980), the court held that a statement of prosecutor during closing argument to jury did not warrant reversal where defendant waited until argument had been completed to object to alleged impropriety. In then instant case, the South Carolina Supreme Court relied upon State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), where the Court held that the appellant's failure to timely object during the argument to the same claim raised in the appeal precluded consideration of the claim. The Petitioner attempts to parse this procedural decision by the final arbiter of state procedure - the South Carolina Supreme Court - by alluding that the objection which came too late in Holmes case could have been preserved because the trial court had time to cure the error before the case was submitted to the jury. This, however, is not South Carolina practice. The trial court and the Supreme Court knew better about the demands of state practice.

Contrary to the claims of the Petitioner, a belated motion and objection after the completion of the argument does not preserve the issue. The late objection deprived the trial court of the opportunity to address the issue while the argument was ongoing and have the opportunity to address it in context. In depriving the court of this opportunity, the matter was not preserved.

In Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553, 115 L.Ed.2d 640 (1991), the Court reaffirmed that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also Harris v. Reed, 489 U.S. 55, 262, 109 S.Ct. 1038, 1042-1043, 103 L.Ed.2d 308 (1989). The Court has stated that it lacks jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-464, 89 L.Ed. 789 (1945); see also Sochor v. Florida, 504 U.S. 527, 533-534 (1992).

Since the matter was properly held to be barred as a matter of state procedure, certiorari consideration of this closing argument

issue is precluded due to lack of jurisdiction. Here, the state procedural bar is wholly independent of the federal ground. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 125 (1945). On this issue, the writ must be denied.

2. The comments do not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

Alternately, assuming this matter is procedurally preserved, this second issue does not demand certiorari where the comments did not cause unfairness to make the conviction a denial of due process. The Petitioner's reliance upon Simmons v. South Carolina, 512 U.S. 154 (1994) and Skipper v. South Carolina, 476 U.S. 1 (1986) is misplaced. In those cases, the Court found due process violations where there was a deprivation of his right to a fair rebuttal when he was barred from presenting competent and relevant evidence to explain the comments. Contrary to those settings, the failure to present competent and relevant evidence does not afford the Petitioner the opportunity to present evidence that fails evidentiary standards. Certiorari is not warranted here.

The general rule concerning closing arguments in South Carolina is that a solicitor must confine his arguments to the record and its reasonable inferences, State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990), but the failure to do so will not automatically result in a new trial. A new trial will only be granted where the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction or sentence a denial of due process. Johnson v. State, supra, Donnelly v. DeChristoforo, 416 U.S. 637 (1974), State v. Patterson, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1997). A "momentary lapse of good taste will rarely constitute prejudicial error." State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984). The Court has also held that a solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. Caldwell, supra, 300 S.C. at 504, 388 S.E.2d at 822, State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). "A court should not lightly infer that a prosecutor intends an ambiguous remark to have is most damaging meaning or that a jury, sitting

through lengthy exhortation will draw that meaning from the plethora of less damaging interpretations." Donnelly, supra 416 U.S. 637, 646.

Where a defendant presents evidence at trial, the prosecutor may comment on the defendant's failure to present the testimony of seemingly accessible witnesses who are or should be aware of relevant information. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Shackelford, 228 S.C. 9, 88 S.E.2d 778 (1955).However, where the defendant produces no evidence on his behalf, it is improper for the prosecutor to comment on the defendant's failure to call a particular witness. See State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977). The jury should ordinarily be instructed not to draw inferences from the neglect of a defendant to call witnesses. Douglas, supra.; State v. Browning, 154 S.C. 97, 151 S.E. 233 (1930).

The Petitioner asserts this remark about who did it if not Holmes and where is the person who killed the victim was a comment in violation of the Petitioner's right to require the state to prove his guilt beyond a reasonable doubt. In the state court, he cited Doyle v. Ohio, 426 U.S. 610 (1976) and Griffin v. California, 380 U.S. 609 (1965). This claim was not raised therein as a Due Process claim under either the Simmons or Skipper analysis which he now asserts for the first time.

As below, the Petitioner ignores the fact that he did, in fact present evidence in his defense and did in fact testify in his defense. ROA 3661-3708, 3751- 4072. Therefore, his reliance upon these cases do not apply to his claim. State v. Primus, 341 S.C. 592, 535 S.E.2d (2000). Simply put, there can be not Fifth Amendment error nor is their an improper shift in the burden of proof by these comments when the defense presented a defense to the action.

A prosecutor is allowed to state his version of the case. It is clear that throughout his argument, the prosecution was anticipating an argument that Holmes was "framed" or early on targeted as a

suspect.[8] It is also clear that he had failed to satisfy the requirements to bring forth reliable evidence of third party guilt. The question is not whether the Petitioner attempted to create such evidence for purposes of a prosecution argument limited to the record, the point of permissible argument is whether he was argument the permissible inferences from the record introduced to the jury. Solicitor Pope committed no error in his presentation. For these alternate reasons, the matter is without merit.

Respondents respectfully submit that this claim is without merit for certiorari. It must be dismissed for lack of jurisdiction where the same claim was not timely presented to the state court.

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,
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[8] See Testimony of Chief William Mobley where the prosecutor questions him on whether he planted evidence or sought to frame Holmes. ROA 2803-04.